IS THERE AN EIGHTEENTH AMENDMENT?

The statement [2] which has been promulgated [3] as the Eighteenth Amendment has been widely discussed in the press and periodicals. Its legal inception has been challenged because the proposing resolution was not adopted by two-thirds of all the members elected to both houses of the Congress, although by two-thirds of those present; the impossibility of the enforcement of its provisions and the illegality of concurrent legislation by the Congress and state legislatures have been considered; it has been pronounced economically unwise, commercially unsound, subversive of liberty, of good government, of the principle of local self-government (which is nearest to the point involved), and of the theory that the constitution should be limited to the fundamental principles of government, and as violative of all settled principles of property; and the sufficiency of its ratification by the legislatures of those states which have constitutional referendum provisions has been questioned. On the other hand, it has been supported and defended against all such attacks. But little if any discussion has appeared of the fundamental and controlling proposition that the "amendment" can have no validity unless duly ratified on behalf of the people of all the states.[4]

The soundness of three legal propositions must be apparent

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2. "Sec. 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

3. By the Hon. Frank L. Polk, acting Secretary of State, on January 29, 1919. *New York Times*, January 30, 1919.

4. The legislatures of three states have not ratified the "amendment."

without any very deep reading of the constitution or prolonged reflection on the theory of our government, namely, first, that intra-state prohibition cannot be the subject of a valid constitutional amendment in the sense in which amendments are referred to in the constitution; second, that such prohibition cannot be grafted upon the constitution without the consent of the people of all of the states; and third, that such consent cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively.

Outside of and beyond the question as to how far, in an orderly and wise system of republican form of government, a constitution should embrace rules to govern the daily life and ordinary habits of a people—should, in a measure, supplant usual statute law [4a]—is the question of what would be proper or valid amendments within the meaning of Article V of the constitution.

It will not be contended, for example, that a constitutional amendment that destroyed the union would be valid if ratified by only three-fourths of the states.[4b] One of the declared purposes of the constitution was "to form a more perfect union," that is, more perfect than the "perpetual" union established by the Articles of Confederation. "It is difficult," said Chief Justice Chase, "to convey the idea of indissoluble unity more clearly than by

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4a. The Constitution was merely intended to regulate the general political interests of the nation, not to regulate every species of personal and private concern. *The Federalist* (Hamilton), 84 (Dawson's ed.).

4b. "If anything can be regarded as settled in the constitutional law of any people, it must now be looked upon as placed beyond further controversy, that the Constitution of the United States is an instrument of government, agreed upon and established in the several States by the people thereof, through representatives empowered for the purpose, operative upon the people individually and collectively, and, within the sphere of its powers, upon the government of the States also. And that the Union which is perfected by means of it is indissoluble through any steps contemplated by, or admissible under, its provisions or on the principles on which it is based, and can only be overthrown by physical force effecting a revolution." Story on the Constitution (5th ed.), vol. 1, pp. 222-223n (by Cooley).

these words. What can be indissoluble if a perpetual union, made more perfect, is not?"[5]

Nor would such an amendment so adopted be valid if it destroyed the entity and sovereignty of the states. The union is perpetual and indissoluble and the sovereignty of the states is equally so. The United States could not exist without the states, but the states might continue to exist even though disunited.[6] "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible union composed of indestructible States." [7]

But the line between proper and improper "amendments must be drawn on the basis of a principle, not on the basis of the imminence or remoteness of catastrophe—the destruction of the entity and sovereignty of the United States or of the several states. That principle is that nothing may be the subject of an amendment which is of a class that could lead to the destruction of either the United States or the states.

Argument based on the possible consequences that might flow from a particular construction of an instrument is not always the most conclusive, but when such consequences would be so serious, far-reaching and pervading, so great a departure from the structure and spirit of our institutions, and would radically change the whole theory of the relations of the state and federal governments to each other and of both to the people, such argument has force and is irresistible.[8]

Thus an amendment abolishing the legislative or the executive branch of the federal government would not be a valid amendment. A sovereign government cannot be conceived of without agencies through which those powers can function. Those agencies might be changed in form or scope or even amalgamated, but they could not be abolished. Every sovereign gov-

5. Texas *v.* White, 7 Wall. (U. S.) 700 (1868), at p. 725.
6. Lane County *v.* Oregon, 7 Wall. (U. S.) 71 (1868), at p. 76.
7. Texas *v.* White, 7 Wall. (U. S.) 700 (1868), at p. 725.
8. Maxwell *v.* Dow, 176 U. S. 581 (1900), at p. 590.

ernment must have power to make and enforce laws. It may be a fair question whether or not by constitutional amendment all judicial authority under the United States could be annihilated.[9] All judicial functions might perhaps be surrendered back to the states, but without the destruction of the sovereignty of the United States there could not be an annihilation of its legislative or executive functions.

Nor would an amendment be valid which deprived the states of their power of taxation. The power of taxation is indispensable to the existence of the states; it is an essential function of government.[10] To deprive a state of this essential of sovereign power would differ only in degree from the entire annihilation of the state.

This is the true conception of our government—it is indestructible both as to the entity and sovereignty of the United States and as to the entity and sovereignty of the states, unless such destruction is accomplished by consent of the people of all of the states.

If this were not so, then three-fourths of the states could wipe out all state lines and laws and sovereign existence without the consent and against the will of the others, with the one exception that without its consent no state may be deprived of its equal suffrage in the Senate.[11] Nor is there anything in that exception that "no state, without its consent, shall be deprived of its equal suffrage in the Senate," that is inconsistent with such conception of our government. A state might have an unequal suffrage in the Senate without losing its sovereignty and, on the other hand, no state would be entirely destroyed if it retained such "equal suffrage."

The effect of the exception is to confirm the doctrine that no state without its consent can be entirely destroyed by action of the other states. If it continues to have equal suffrage in the Senate until it consents otherwise, not only must the Senate continue to exist, but the state as an entity also.

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9. Hollingworth *v.* Virginia, 3 Dall. (U. S.) 378 (1798), at p. 381.
10 Lane County *v.* Oregon, *supra,* note 6 at p. 76.
11. Article V.

But if it is argued that except for the exception, three-fourtns of the states might wipe out this last vestige of state entity and that that was the reason for the exception, the answer is plain that the exception was necessary, not because otherwise a state might be entirely destroyed against its will, but because the constitution contained provisions in respect of the Senate and the representation of the states therein, and those provisions would therefore have been susceptible of amendment by three-fourths of the states. If under such an amendment the representation in the Senate had been fixed on a population basis as in the House, the states would nevertheless still be sovereign states.

The argument is irresistible that the principle by which the validity of any amendment adopted by three-fourths of the states must be tested is whether or not the subject of it is of a class that, followed to the end by subsequent amendments, would result in the destruction of the United States or of the states. If it is, then the subject may not be embodied in a valid amendment, which means that valid amendments must be coufined to changes in the powers and provisions which the several states surrendered to the United States and inserted in the constitution at the time of its adoption.

We are considering amendments within the meaning of tha word as used in the constitution, amendments that may be ratified by the legislatures of three-fourths of the several states or by conventions held in three-fourths thereof.

All of the states, acting through the people thereof, could permit one of their number to withdraw,[12] and, without doubt, all of the states by unanimous action through the people of them respectively could dissolve the union. Without doubt also, all of the states by unanimous action so taken could make the union still "more perfect" by surrendering to the United States some or all of their reserved powers, to the extent even of completely destroying their entity and sovereignty, but without such unanimous consent no state may be lawfully deprived of any of the sovereign powers which it has never surrendered, but has

12. Texas *v.* White, *supra,* note 7 at p. 726.

affirmatively reserved to itself or to the people,[13] any more than, father, the eminent Chief Justice, alludes to "his favorite clause of the in the first instance, could either of the two states[14] that did not promptly ratify the constitution have been forced into the union. They were excluded not by any warrant in the Articles of Confederation, but by action which was really revolutionary in character.[15] To have established the constitution without the ratification of it by those two states may have amounted to coercion, but there has never been a suggestion in the books that any one ever thought that those two states could have been *compelled* to ratify. That they did subsequently voluntarily resume their places in the union does not weaken the argument.

Among those reserved powers is the police power,[16] upon which alone "prohibition" laws (except in connection with the

13. Tenth Amendment. "Professor Parsons, in speaking of his Constitution—that which reserves to the several states all powers not expressly delegated to Congress:—a clause for which he may well have had the affection of paternity. Whether he valued this provision too highly, time will show. I cannot but think, as I believe he thought, that it is to this principle our country,—if it is to remain one country—must look for political salvation, or look for it in vain." Memoir of Theophilus Parsons, by his son, Theophilus Parsons, p. 258.

14. North Carolina and Rhode Island.

15. Cooley, Constitutional Limitations (7th ed.), 9; IV H. dreth, History of United States, 147, 149; II Pitkin, History of United States, 336.

"Two questions of a very delicate nature present themselves on this occasion: (1) On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? (2) What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it? The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed." *The Federalist* (Madison), 42 (Dawson's edition).

16. Slaughter-house Cases, 16 Wall. (U. S.) 36 (1872), at p. 62; Barbier *v.* Connolly, 113 U. S. 27 (1885), at p. 31; in re Rahrer, 140 U. S. 545 (1891), at p. 554.

regulation of interstate commerce) rest.[17]

It is "a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life." [18]

It is as sacred and essential to sovereignty as the rights to establish courts of justice, to define crimes and provide for penalties to levy taxes, to charter railroad and commercial corporations, institutions of learning, hospitals and banks, to provide for the education of the people, to provide for the devolution of estates, to regulate fiduciary and domestic relations, to establish laws of marriage and divorce, or to pass any other laws for the preservation of order and the protection of life, liberty and property. An "amendment" which takes away a part of the police power, this attribute of sovereignty, is in the same class as an "amendment" which would strip the states of all their sovereign powers, of all the essential functions of government. The line of distinction between the subjects which do and those which do not form a proper basis for valid amendments cannot be drawn through the middle of a class, cannot be drawn, as we have observed above, with reference to the imminence or remoteness of the ultimate sweeping away of the existence of any one of the states without its due consent. To the existence of the States, themselves necessary to the existence of the Union, these powers are indispensable.[19]

Nor is there any precedent to the contrary suggested by any

17. License Cases, 5 How. (U. S.) 504 (1847); Passenger Cases, 7 How. (U. S.) 283 (1849); License tax Cases, 5 Wall. (U. S.) 470 (1867); United States *v.* Dewitt, 9 Wall. (U. S.) 41 (1869), at p. 45; Kidd *v.* Pearson, 128 U. S. 1 (1888); Mugler *v.* Kansas, 123 U. S. 623 (1887), at p. 657.

18. Cooley, Constitutional Law (3d Ed.), 250.

19. Said in reference to the power of taxation, Lane County *v.* Oregon, *supra,* note 6; "In the Constitution the term 'state' most frequently expresses the combined idea . . . of people, territory and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." Texas *v.* White, *supra,* note 5, at p. 721.

of the existing seventeen amendments to the constitution. By none of those amendments did the states surrender any of their reserved powers.

"That the first ten Articles of Amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since." [20]

The first eight amendments were inhibitions upon the federal government alone and by them the states surrendered nothing.

The Ninth and Tenth Amendments were not additions to the unanimous agreement of the conventions of the people of the several states that adopted the constitution, but merely definitions of what the constitution meant, merely declaratory.

Nor can it be said that the Tenth Amendment was ratified by three-fourths of the states and so may be amended by three-fourths, and that the "Eighteenth Amendment" is in effect merely an amendment of the Tenth Amendment. All of the first ten amendments were in reality the *meaning* of the original constitution and not changes in it. They were adopted in compliance with an understanding at the time of the submission of the constitution, that they would be so adopted; in reassurance and evincement to the enemies of the constitution, who based their opposition on their contention that it did not contain a bill of rights, of the good faith and sincerity of the friends of the constitution, who contended that it did in effect contain a bill of rights in its guaranty of republican forms of government and other provisions.[20a]

"The Constitution," says Story, "was accepted and put in force in anticipation of, and in reliance upon, the adoption of

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20. Spies *v.* Illinois, 123 U. S. 131 (1887), at p. 166; Barron *v.* Baltimore, 7 Pet. (U. S.) 243 (1883), at p. 250; Livingston *v.* Moore, 7 Pet. (U. S.) 469 (1833), at p. 552.

20a. The preamble to the resolution preceding the original proposition of the amendments by the first session of the first Congress of the United States shows that the amendments were regarded by the Congress as declaratory and restrictive. 8 Wendell (N. Y.) 85 (1831), at p. 100.

these amendments, and by them the instrument was completed.[20b]

The insertion of the bill of rights (first eight amendments) as inhibitions on the United States alone, necessitated the Ninth and Tenth Amendments under the doctrine *expressio unius est exclusio alterius,* but those two amendments neither added to nor changed the original instrument. The reserved powers, which are all the powers of sovereignty except the few and defined powers that were delegated to the United States,[21] resided somewhere and it is not credible that any one would contend that by the original instrument they were surrendered to the United States and then by the Tenth Amendment taken back by the states respectively or by the people.

The Eleventh Amendment was amendatory of the judicial power of the United States, and so far as it related to the sovereignty of the several states, it restored to them an element of sovereignty that originally the states had surrendered to the federal judiciary, the right of immunity from suit by citizens of another state or by citizens or subjects of any foreign state.

The Twelfth Amendment took nothing from the states, but merely changed the method of the conduct of the electoral college.

The Sixteenth Amendment extended the existing taxing power of the Congress to other sources of taxation and did not take away any of the powers of the states as to taxation.

The Seventeenth Amendment changed the method of electing senators.

The Thirteenth, Fourteenth and Fifteenth Amendments are the only ones which at first thought might suggest the surrender

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20b. Story on the Constitution (5th ed.), vol. 1, p. 220n.

21. "The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiation and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the State." *Federalist* (Madison), 44 (Dawson's ed.).

by the states of sovereign power. Those three amendments are *sui generis*. They were the outgrowth of the Civil War. Their sole reason for being was to confirm the freedom of the African race in this country.[22]

It would be idle to attempt to discuss, within the proper limits of this paper, the question of slavery either legally or historically. Libraries bulge with its literature. Before the union, during the construction of the union and through its early life, both sides of the great question occupied the thoughts and challenged the resources of the ablest jurists, statesmen, economists and pub-

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22. We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him; it is true that only the 15th amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

"We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." Slaughter-house Cases, *supra*, note 16, at pp. 71-72.

licists of this country and England. Three times it brought the union to the verge of disaster.[23]

Whatever may have been the varying statutory status of slaves in the colonies and the states under the confederation, the institution of slavery was not recognized by the law of England,[24] although the traffic was connived at in the colonies.

Slavery is repugnant to a republican form of government which, in strictness, is by no means inconsistent with monarchical forms where the powers of legislation are left exclusively to a representative body freely chosen by the people.[25] The rights of free men were inherent in each citizen of a state or of the United States and were inherited from Great Britain under the common law and Magna Carta.

The compromises of the constitution [26] on the subject left with the United States the power to prohibit the importation of slaves after the year 1808.[27] The subject was, therefore, in some measure recognized as within the purview of the constitution. "It is worthy of remembrance," says Cooley, "that the Constitution, as finally agreed upon, did not mention it (slavery) by name, but only referred to servitude and the slave trade in vague terms as things the existence of which under a free constitution was to be overlooked rather than recognized." [28] That truly was its

23. (a) The compromises of the constitution were embodied in art. I, sec. 2, sub. 3; art. I, sec. 9, sub. 1; and art. v. Von Holst, Constitutional History of the United States, vol. 1, 292.

(b) The Missouri Compromise; Cooley, Constitutional Law (3d ed.), 234.

(c) The Civil War.

24. "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England." Lord Mansfield in Somerset *v.* Stewart, 20 State Trials, 1, 82 (1772).

25. Cooley, Constitutional Law (3d ed.), 214.

26. Story on the Constitution (5th ed.), secs. 636-644, 1332-1337, 1807, 1811. Constitution, art. I, sec. 2, sub. 3; art. I, sec. 9, sub. 1; art. v.

27. Art. V.

28. Story on the Constitution (5th ed.), vol. 2, sec. 1916 (by Cooley).

status at the time of the convention. It had fallen more and more into ill favor, the avowed public sentiment against it was growing, and state after state was forbidding it. But in later years the invention of the cotton gin and the development of the agricultural interests of the southern states revived its strength rapidly and increased its defenders.

How long in the peaceful progress of the states the institution would have continued before meeting affirmative prohibitory law is a question of speculation that can have no practical value at this time.

Whatever may have been contemporaneous opinion as to the legality of the institution, the actual settlement of the question was not through legal development or constitutional provisions, but was by that last resort of humanity which must always be regarded judicially as the final determination. Slavery was the overshadowing and efficient cause of the Civil War and whether legalized or not, it perished in that struggle.[29] When a conclusion is presented as the arbitrament of war, courts are powerless.

The proclamations of President Lincoln and President Johnson made support of those proclamations and of the acts of the Congress conditions of amnesty and the emancipation of the slaves was confirmed, rather than ordained, in the insurgent states, by the Thirteenth Amendment.[30] That amendment and the two which followed it, progressively confirmed and established the decree of the war. None of them required from the states the surrender of any power which any free government should ever employ.[31] Had a state or its people assented that the Thirteenth Amendment destroyed a right to support slavery by law or a right to hold slaves, the answer would have been, as it would be now, that disregarding the opinion of civilization or the precedents of law as to the existence or non-existence of such rights, the matter had been settled by the bitterness and force of conflict, and that if any such rights ever existed they were not taken away by the amendment, but the taking away

29. Slaughter-house Cases, *supra,* note 16, at p. 68.
30. Texas *v.* White, *supra,* note 5, at p. 728.
31. Cooley, Constitutional Law (3d ed.), 221.

culminated in the stern scene at Appomattox, from which there could have been no appeal

Republicanism has its roots in the equality of the rights of the citizens. Every republican government is bound to protect its citizens in those rights. They were proclaimed in the Declaration of Independence—that all men are created equal and that among the unalienable rights with which they are endowed by their Creator are the rights of life, liberty and the pursuit of happiness. These the United States guaranteed in the constitution [32] when it guaranteed to every state a republican form of government. Those three amendments carry out this guarantee. They took nothing from the states, but merely emphasize the obligations inherent in the republican governments of the states. They were declaratory of the fact of the complete obliteration of slavery and of all conditions of servitude attaching to it. They are declaratory of human rights and liberty and of restraints on the powers of the states. But no power so declared to be inhibited ever was inherent in free governments under Anglo-Saxon liberty, and, if any property rights were denied to the people, they were those which the war had already decreed should not obtain.

We are not without sound authority for this theory. The Fourteenth Amendment contains three provisions relating to the liberties of citizens,—against laws abridging the privileges or immunities of citizens of the United States; against depriving any person of life, liberty or property without due process of law; and against laws denying any person equal protection of the laws.

The first provision relates solely to the privileges and immunities of citizens of the United States as distinguished from citizens of the states,—the privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the constitution of the United States. The privileges and immunities of citizens of the states as such still rest in the care of states.[33]

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32. Art. IV, sec. 4.

33. Ex parte Kemmler, 136 U. S. 436 (1889), at p. 448; Maxwell *v.* Dow, *supra,* note 8, at p. 593.

The second [34] and third [35] provisions simply furnish additional guarantees against encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

"The equality of the rights of citizens is a principle of republicanism. Every republican g rnment is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty." [36]

The other sections of the Fourteenth Amendment are amendatory of matters already contained in the constitution, except perhaps the inhibition against the payment of a debt incurred in aid of insurrection or rebellion against the United States or for the loss or emancipation of any slave. That inhibition was justified as a condition of reconstruction after the Civil War and was declaratory of a condition, as a war penalty, under which the Confederate States remained in the union.

The Fifteenth Amendment affirmed the principle of the equality of the human race under a republican form of government and strengthens the guaranty that no line, in the enjoyment of the suffrage, may be drawn on the basis of race, color or previous condition of servitude. That principle is inherent in a republican form of government. The amendment does not inhibit the restriction of the franchise on the basis of property or educational qualifications, but recognizes the right of the sovereign state so to limit the franchise.[37] It does, however, fulfil the guaranty of the underlying thought of a free people, "that *all* men are created equal."

The third proposition stated at the beginning of this paper is

34. Davidson *v.* New Orleans, 96 U. S. 97 (1877), at p. 101.

35. U. S. *v.* Cruikshank, 92 U. S. 542 (1875), at p. 555.

36. U. S. *v.* Cruikshank, *supra,* note 35, at p. 555.

37. U. S. *v.* Reeve, 92 U. S. 214 (1875), at p. 217.

that the unanimous consent of the states necessary to graft upon the constitution a provision establishing intra-state prohibition cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively.

Chief Justice Marshall, in repudiating the doctrine that the constitution was the act of sovereign and independent states and did not emanate from the people, said:

"The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretentions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves or become the measures of the state governments."

"From these Conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity and secure the blessings of liberty to themselves and to their posterity.' The assent of the States in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it;

and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."

"It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."

"The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." [38]

Such of the sovereign powers as were originally surrendered by the states to the United States were, therefore, so surrendered, not by the states as sovereignties acting through their legislatures, but by the people of the several states acting in the only way in which they can act, by conventions. If, in order to delegate to the United States those powers which were delegated by the constitution, it was necessary that the people as such should act in the matter and they did so act, equally is it necessary, in order to surrender other powers "not delegated to the United States by the constitution," but "reserved to the states

38. M'Culloch *v.* Maryland, 4 Wheaton (U. S.) 316 (1819), at p. 403 *et seq.*

respectively or to the people," that the people [39] should act in the same formal and specific manner.

The hysteria of the times finds in the state constitutions scope and facility for its tinkering tendencies almost equal to the opportunities offered by statute law, and these tendencies are manifesting themselves with more and more persistency, particularly in the younger states. But those opportunities do not satisfy the insatiable spirit of change and regulation, which seems to find peculiar pleasure in upsetting precedent and tradition and in taking advantage of public apathy, because of which a busy minority always can control. There is much more zest in raising a supposedly irremovable obstacle to the exercise of the public will than there is in putting up hurdles that may be easily overthrown by change or crystallization of sentiment.

The state constitutions are as elastic as the varying moods of the people of the respective states. The ultimate sovereignty,—except such as has been surrendered or delegated to the United States,—resides in the people of the respective states; they may do with it as they like. When they delegated certain powers they provided for changes in those powers and in the machinery for exercising them, and in that very provision delegated the power to make such changes. They left it to the Congress to determine whether such changes should be made by legislatures or conventions, and they agreed that, when three-fourths of the states agreed, it should be sufficient. They inherently have the right to control their legislatures by referendum or otherwise just as they so have the right to fix the size and arrange for the election of their legislatures.

A few such changes have been made. If the reasoning of this paper is sound, the only changes that have been made are in the Eleventh, Twelfth, Sixteenth and Seventeenth Amendments. All of the others (excluding, of course, the "Eighteenth Amendment") are merely expressive or declaratory of what the constitution means and originally was intended to mean, are declaratory of liberty and of the principles of it, and all of them are

39. "People" as used in the Tenth Amendment means people of the States, not people of the United States. Curtis, Const. Hist., vol. 2, p. 160n.

assertive of those fundamental rights which are the foundation of a republican form of government.

But those powers and sovereign rights, which the people did not delegate, they reserved to the states *respectively,* not collectively, or to themselves, that is, to the peoples *respectively* of the several states. "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." [40]

Not having contracted away those powers and rights, not having delegated them or any control over them, not having made any agreement in respect of them, but having affirmatively reserved them for exercise or future disposition, the people of *each* state must consent before those powers and rights may go to reside elsewhere.

The "Eighteenth Amendment" brings the country, therefore, to a parting of the ways, not only, incidentally, as to the nature of the subject, in that it is the first attempt in the constitution to control or restrict individual liberty, but also because, under the guise of an amendment of the constitution, it seeks to take from the people and the states what never was granted by them, what was affirmatively reserved to the states *respectively* or to the people, and, without unanimous consent, to delegate it to the federal government. It is as if an attempt were now made by three-fourths of the states of the union, acting through their legislatures, to destroy state entity and sovereignty and to unite all features and functions of government in one central government, with the states as mere geographical names preserved for the purpose of giving equal suffrage in the Senate, but looking for every other right and power to the whole American people compounded into "one common mass." That is not the theory of our government nor could our government endure under that theory.

The fact that the "Eighteenth Amendment" violates the principle of local self government is, although without direct bearing on the legal propositions asserted and considered in this paper, convincing of the unwisdom of the enterprise. That prin-

40. M'Culloch *v.* Maryland, *supra,* note 38, at p. 403.

ciple of decentralization "is one which almost seems a part of the very nature of the race to which we belong." [41] It has obtained in England from the earliest ages. It is the rock upon which our Republic is founded. The absence of it has caused republics to fall. It finds expression not only in the limitations on the national government, but also in the subdivisions under the states. Commentators on our civil polity not only uniformly have noted it, but have ascribed to it the maintenance of the liberty we have continued to enjoy.

The reverse of that principle is the danger signal flashed by history. Particularly in this country of great territorial extent, of urban concentration and rural paucity of population, of diversity of climate, natural conditions, resources, habits, occupations, economic circumstances and social interests, the perils of centralization in respect of affairs purely local in their nature and not those specifically and wisely delegated in the constitution, are apparent from the lessons of the past. It is to the principle of local self government that "our country—if it is to remain one country—must look for political salvation, or look for it in vain.' [42]

It is unfortunate that the test has come in connection with a matter that is by some regarded as a moral issue. Expediency is always an insidious argument and any diverting thoughts tend to cloud the true significance of a situation such as this that now confronts our country.

JUSTIN DUPRATT WHITE, in *Cornell Law Quarterly.*

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41. Cooley, Constitutional Limitations (7th ed.), p. 263.

42. *Supra,* note 13. In Story on the Constitution (5th ed.), vol. I, pp. 199-205, is an impressive note by Judge Cooley, citing many authorities and discussing this principle.